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EXECUTIVE CALENDAR—Continued

Mr. MERKLEY. Let's turn to Planned Parenthood Association of Utah v. Herbert. In August of 2015, Gary Herbert, Utah's Republican Governor, ordered the State to strip \$272,000 in Federal funding from the Planned Parenthood Association of Utah in response to a series of highly edited videos that alleged that Planned Parenthood clinics were selling fetal tissue, even though Utah's clinics were not in the video then.

By the way, those videos had been found to be completely doctored, completely inaccurate, completely misleading. But despite the fact that the videos were not authentic and despite the fact that they didn't have any bearing in Utah, Governor Herbert stood by his ruling to carve out and take away funding from Planned Parenthood. So Utah's Planned Parenthood Association filed for a restraining order against the State, saying that the State was not acting justly, so they asked the Court to protect them from unjust action.

In spite of his continued claim that stripping the funding was not to punish the organization for its stance on abortion but in response to the videos—the doctored, inauthentic, discredited videos—the Governor eventually admitted, while responding to Planned Parenthood's motion for a preliminary injunction, that defense of the videos involved different affiliates—not the ones in Utah—that there was not even an accusation that Planned Parenthood in Utah had broken the law—not even an accusation. The organization didn't participate in programs that provided fetal tissue for research, so it was completely disconnected from the operation of Planned Parenthood in that State.

The background of this is that medical institutions have utilized fetal tissue and there have been charges re-

lated to the preparation of that tissue. We could have a whole debate, and we should bring in the medical professionals to understand the details. But in this case, it is irrelevant to have that debate because Planned Parenthood in Utah wasn't part of the fetal tissue research organization. So we don't have to argue over whether fees they have charged for repairing the tissue were fair or unfair because they didn't repair anything. This was all about something else, which was the Governor's decision to launch an attack on Planned Parenthood, punish Planned Parenthood for its constitutionally protected advocacy.

This issue is one which I am sure we will be talking about for years to come. But in the context of the law, a three-judge panel of the Tenth Circuit granted a preliminary injunction on Planned Parenthood, concluding that Utah's Planned Parenthood was operating lawfully and that the Governor's personal opposition to abortion as a motivation for blocking Federal funds and targeting the health organization did violate its constitutional rights.

So when this was decided, neither Planned Parenthood nor the State of Utah sought to have the Tenth Circuit rehear the case en banc, which means all the judges that serve on the Tenth Circuit. So you had a three-judge panel that made a decision. Neither side of the case—they were like, OK, we are done with this. We are done with this. The practice wasn't even relevant to the association in Utah, not just because the videos were from different States, not just because the videos were doctored and basically illegitimate, but also because they were about a fetal research program that the organization in Utah didn't participate in.

So from every possible direction, both sides said: Peace. The judge has ruled, and we understand why. We ac-

cept their ruling. But did Judge Gorsuch accept the ruling? No. He dissented from the court's denial and wanted to grant an en banc review, not at the behest of any litigant, just that Judge Gorsuch didn't like the outcome of the case and wanted to have a full panel in hopes of getting the decision that would defer to Governor Herbert, who wasn't seeking any review because he wanted to strip the organization's funding, even though the organization had done nothing wrong and didn't participate in the program at all. In other words, Judge Gorsuch was willing to ignore court practice and custom and a whole set of facts that showed that the whole decision the Governor made was on the wrong basis—wrong basis on the facts because the videos were doctored, wrong basis on the facts because it wasn't even about the State of Utah, wrong basis on the facts because Planned Parenthood of Utah didn't participate in this research program—wrong on every level.

But Judge Gorsuch wanted to ensure that he could show a case backing Utah's Republican Governor that eliminated funding for Planned Parenthood. That is judicial activism. That is rewriting the law. That is not a judge; that is a legislator. A person who wants to rewrite the law in the frozen trucker case, a person who wants to rewrite the law in the autistic child case, a person who wants to rewrite the law in the Planned Parenthood case should run for office and legislate, not use the courts as your personal strategy for judicial activism; that is, to rewrite the law, the opposite of what the law says.

In the majority's opinion, Judge Mary Briscoe wrote separately to highlight the troubling nature of Gorsuch's dissent. She noted first how “unusual” and “extraordinary”—those are words that she put in—it would be for the Tenth Circuit, on its own motion, to order an en banc review when neither

● This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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